

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF:

[RM 10.9 Operable Unit of the](#) Lower
Passaic River Study Area portion of the
Diamond Alkali Superfund Site

In and About Essex, Hudson, Bergen and
Passaic Counties, New Jersey

~~Alliance Chemical, Inc. on behalf of itself
and Pfister Chemical, Inc.; Arkema Inc.~~
[Arkema Inc.](#), Ashland Inc.; Atlantic
Richfield Company; BASF Corporation, on
its own behalf and on behalf of BASF
Catalysts LLC; Belleville Industrial Center;
Benjamin Moore & Co.;
Bristol-Myers Squibb Company; CBS
Corporation, a Delaware corporation, f/k/a
Viacom Inc., successor by merger to CBS
Corporation, a Pennsylvania corporation,
f/k/a Westinghouse Electric Corporation;
~~Celanese Ltd.~~[CNA Holdings LLC](#); Chevron
Environmental Management Company, for
itself and on behalf of Texaco, Inc.; Coltec
Industries; Conopco, Inc. d/b/a Unilever (as
successor to CPC/Bestfoods, former parent
of the Penick Corporation (facility located at
540 New York Avenue, Lyndhurst, NJ));
[Cooper Industries, Inc.](#); Covanta Essex
Company; Croda Inc.; [DII Industries](#);
DiLorenzo Properties Company on behalf of
itself and the Goldman /Goldman/DiLorenzo
Properties Partnerships; E. I. du Pont de
Nemours and Company; Eden Wood
Corporation; Elan Chemical Company;

EPEC Polymers, Inc. on behalf of itself and
EPEC Oil Company Liquidating Trust;
Essex Chemical Corporation; Flexon
Industries Corp.; Franklin-Burlington
Plastics, Inc.; Garfield Molding Co., Inc.;
General Electric Company;

ADMINISTRATIVE SETTLEMENT
AGREEMENT AND ORDER ON
CONSENT FOR REMOVAL ACTION
[INCLUDING PILOT STUDIES](#)

U.S. EPA Region 2
CERCLA Docket No. 02-2012-20xx

Proceeding Under Sections 104, 106(a), 107
and 122 of the Comprehensive
Environmental Response, Compensation,
and Liability Act, as amended, 42 U.S.C. §§
9604, 9606(a), 9607 and 9622

Givaudan Fragrances Corporation (Fragrances North America); Goodrich Corporation on behalf of itself and Kalama Specialty Chemicals, Inc.; Hess Corporation, on its own behalf and on behalf of Atlantic Richfield Company; Hexcel Corporation; Hoffmann-La Roche Inc. on its own behalf, and on behalf of its affiliate Roche Diagnostics; Honeywell International Inc.; ISP Chemicals LLC; ITT Corporation; Kao Brands Company; Leemilt's Petroleum, Inc. (successor to Power Test of New Jersey, Inc.), on its behalf and on behalf of Power Test Realty Company Limited Partnership and Getty Properties Corp., the General Partner of Power Test Realty Company Limited Partnership; Lucent Technologies Inc.; Mallinckrodt Inc.; National-Standard LLC; Newell Rubbermaid Inc., on behalf of itself and its wholly-owned subsidiaries Goody Products, Inc. and Berol Corporation (as successor by merger to Faber-Castell Corporation); News Publishing Australia Ltd. (successor to Chris-Craft Industries); Novelis Corporation (f/k/a Alcan Aluminum Corporation); ~~NPEC Inc.~~; Occidental Chemical Corporation (as successor to Diamond Shamrock Chemicals Company); Otis Elevator Company; Pfizer, Inc.; Pharmacia Corporation (f/k/a Monsanto Company); PPG Industries, Inc.; Public Service Electric and Gas Company; Purdue Pharma Technologies, Inc.; Quality Carriers, Inc. as successor to Chemical Leaman Tank Lines, Inc., its affiliates and parents; Reichhold, Inc.; Revere Smelting and Refining Corporation; Safety-Kleen Envirosystems Company by McKesson, and

McKesson Corporation for itself; Sequa Corporation; Sun Chemical Corporation; Tate & Lyle Ingredients Americas, ~~Inc.~~ LLC (f/k/a A.E. Staley Manufacturing Company, including its former division Staley Chemical Company); Seton Tanning; Teva Pharmaceuticals USA, Inc. (f/k/a Biocraft Laboratories, Inc.); Teval Corporation; Textron Inc.; The BOC Group, Inc.; The Hartz Consumer Group, Inc., on behalf of The Hartz Mountain Corporation; The Newark Group; The Sherwin-Williams Company; ~~The Stanley Works~~ Black & Decker, Inc.; Three County Volkswagen; Tiffany and Company; Vertellus Specialties Inc. f/k/a Reilly Industries, Inc.; Vulcan Materials Company; Wyeth, on behalf of Shulton, Inc.

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~~Subject to EPA Management Review and Approval – 2/17/2012~~
 RM 10 9 AOC to CPG draft 01 and NW-#396851-v8-LPRSA-_EPA_draft_AOC_for_RM_10_9

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I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Settlement Agreement and Order on Consent (“Settlement Agreement”) is entered into voluntarily by the United States Environmental Protection Agency (“EPA”) and the Settling Parties whose names are set forth in Appendix A (“Settling Parties”). This Settlement Agreement provides for the performance of a removal action, including pilot studies, by the Settling Parties and the reimbursement of Future Response Costs incurred by ~~the United States at or~~ EPA in connection with the Work, as defined herein, to be performed by the Settling Parties in the RM 10.9 Operable Unit of the Lower Passaic River Study Area (“LPRSA”) ~~portion of the Diamond Alkali Superfund Site (the “Site”)~~ generally located in and about Essex, Hudson, Bergen and Passaic Counties, New Jersey.

2. This Settlement Agreement is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622, as amended (“CERCLA”).

3. EPA has notified the State of New Jersey (the “State”) of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. EPA and Settling Parties acknowledge that the Work required by this Settlement Agreement is an integral step in addressing contamination of the Passaic River, and that any other response actions for the LPRSA and Newark Bay may be the subject of separate settlement agreements; provided, however, that the obligations of the Settling Parties under this Settlement Agreement are limited to performance of the Work and the payment of Future Response Costs incurred by EPA as provided herein. Any interim actions, early actions, or remedial actions selected for the LPRSA may be the subject of separate agreements between EPA and the Settling Parties. EPA and the Settling Parties retain any rights that they may have with respect to such response actions. The remedy selection process ~~for any, including the development of remedial alternatives, for any such~~ additional response actions for the LPRSA and Newark Bay ~~will take into consideration, including any remedial actions selected as the result of the RI/FS being completed by the Settling Parties (“RI/FS”) and the Focused Feasibility Study being contemplated by EPA (“FFS”), shall incorporate the results of the pilot studies that are part of the Work to be performed under this Settlement Agreement, prior to a Proposed Plan being issued.~~

5. This Settlement Agreement is intended both to provide for a removal action with respect to certain hazardous substances at RM 10.9 and to provide data necessary for the removal and treatment of the LPRSA sediment pursuant to subsequent orders or agreements. In entering into this Settlement Agreement, the objectives of EPA and the Settling Parties are (a) to provide

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for the conduct by Settling Parties of a removal action including the Pilot Studies of technologies that are potentially applicable to the remedy or remedies to be selected in the RI/FS or the FFS, (b) to recover Future Response Costs incurred by EPA with respect to this Settlement Agreement, and (c) to resolve any liability of the Settling Parties for the RM 10.9 Operable Unit and for Future Response Costs.

56. EPA and Settling Parties recognize that this Settlement Agreement has been negotiated in good faith and that the actions undertaken by Settling Parties in accordance with this Settlement Agreement do not constitute an admission of any liability. Settling Parties do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement Agreement, the validity of the EPA findings of ~~facts~~fact, conclusions of law, and determinations in Sections IV and V of this Settlement Agreement. Settling Parties agree to comply with and be bound by the terms of this Settlement Agreement and further agree that they will not contest the basis or validity of this Settlement Agreement or its terms.

II. PARTIES BOUND

67. This Settlement Agreement applies to and is binding upon EPA and upon each of the Settling Parties and their heirs, successors and assigns. Any change in ownership or corporate status of a Settling Party including, but not limited to, any transfer of assets or real or personal property shall not alter such Settling Party's responsibilities under this Settlement Agreement.

~~7. Settling Parties are jointly and severally liable for carrying out all activities required by this Settlement Agreement. In the event of the insolvency or other failure of any one or more Settling Parties to implement the requirements of this Settlement Agreement, the remaining Settling Parties shall complete all such requirements~~8. The Settling Work Parties that are set forth in Appendix A-1 are jointly and severally ~~liable for carrying out~~ obligated to carry out the all activities required by this Settlement Agreement. This obligation is an equitable covenant such that should any Settling Work Party fail to perform its part of the Work, the other Settling Work Parties shall have a right to compel specific performance. In the event of the insolvency or other failure of any one or more Settling Work Parties to implement the requirements of this Settlement Agreement, the remaining Settling Work Parties shall complete all such requirements. Except as otherwise specifically provided herein, the obligations of the Settling Funding Parties set forth in Appendix A-2 shall be limited to any required payments of money to the Settling Work Parties in the amounts and on the terms provided in the settlements between the Settling Work Parties and the Settling Funding Parties. The Settling Funding Parties shall be liable to the Settling Work Parties for the unpaid balance of any required settlement payments. The Settling Funding Parties, all of whom have already paid or are legally obligated to pay any required settlement amounts to the Settling Work Parties, shall be jointly and severally liable to EPA for

the obligations of this Settlement Agreement if the Settling Work Parties fail to carry out the Work required by this Settlement Agreement.

~~89~~. Settling Parties shall ensure that their contractors, subcontractors, and representatives receive a copy of this Settlement Agreement and comply with this Settlement Agreement. Settling Parties shall be responsible for any noncompliance with this Settlement Agreement.

~~9~~10. Each undersigned representative of EPA and the Settling Parties certifies that he or she is fully authorized to enter into the terms and conditions of this Settlement Agreement and to execute and legally bind EPA or Settling Parties, as the case may be, to this Settlement Agreement.

III. DEFINITIONS

~~10~~11. Unless otherwise expressly provided in this Settlement Agreement, terms used in this Settlement Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Settlement Agreement or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. "Action Memorandum/Enforcement" shall mean the EPA Action Memorandum relating to the ~~Site~~RM 10.9 Operable Unit signed on _____, by the Regional Administrator, EPA Region 2, or his/her delegate, and all attachments thereto. The Action Memorandum/Enforcement is attached as Appendix B.

b.. "Administrative Record" shall mean the administrative record established by EPA pursuant to Section 113(k) of CERCLA, 42 U.S.C. § 9613(k) for the Site.

~~b~~c. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

d.. "CPG" shall mean the Lower Passaic River Study Area Cooperating Parties Group. The Settling Parties are members of the CPG.

~~ee~~. "Day" shall mean a calendar day. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

~~df~~. "Effective Date" shall be the effective date of this Settlement Agreement as provided in Section XXXII.

~~eg.~~ “EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

h. “FFS” shall mean the Focused Feasibility Study being contemplated by EPA with respect to the sediments in the lower eight miles of the LPRSA.

~~fi.~~ “Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Settlement Agreement, verifying the Work, or otherwise implementing, overseeing, or enforcing this Settlement Agreement, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Paragraph ~~3031~~ (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation), Paragraph ~~3341~~ (emergency response), and Paragraph ~~6566~~ (work takeover). Future Response Costs shall ~~also not~~ include ~~all such costs, including direct and indirect costs, incurred by the United States on or after February 13, 2012 but prior to the Effective Date~~ EPA in considering or implementing any response actions other than the Work, nor shall they include any costs incurred by EPA in connection with the FFS.

~~gi.~~ “Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

~~hk.~~ “Lower Passaic River Study Area” or “LPRSA” shall mean that portion of the Passaic River encompassing the 17-mile stretch of the Passaic River and its tributaries from Dundee Dam to Newark Bay located in and about Essex, Hudson, Bergen and Passaic Counties, New Jersey. The LPRSA is the subject of the RI/FS being completed by the Settling Parties. The LPRSA is part of the Site, as hereinafter defined. The eight mile stretch of the Lower Passaic River which is the subject of the FFS is also part of the LPRSA.

~~il.~~ “National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

~~jm.~~ “NJDEP” shall mean the New Jersey Department of Environmental Protection and any successor departments or agencies of the State.

~~kn.~~ “Paragraph” shall mean a portion of this Settlement Agreement identified by an Arabic numeral.

~~lo.~~ “Parties” shall mean EPA and Settling Parties.

p. “Pilot Studies” shall mean, individually and collectively, the pilot scale studies described in the SOW. The Pilot Studies are intended to evaluate *ex situ* decontamination beneficial reuse technologies, as well as innovative capping technologies, and *in situ* technologies, all to be evaluated and considered in the development of remedial alternatives in the RI/FS and the FFS.

q.. “Pilot Study Reports” shall mean the reports submitted to EPA, to be prepared by the Settling Work Parties upon completion of each of the Pilot Studies, describing the results of the Pilot Studies, as provided in the SOW.

r. “RCRA” shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

s. “RI/FS Settlement Agreement” shall mean the Administrative Settlement Agreement and Order on Consent for Remedial Investigation and Feasibility Study, U.S. EPA Region 2, CERCLA Docket No. 02-2007-2009, effective May 8, 2007.

t. “RM 10.9” shall mean the area in the vicinity of river mile 10.9, comprised of a sediment deposit located along the eastern bank of the Passaic River between approximately river miles 10.5 and 11.1 that is the subject of the Work to be performed under this Settlement Agreement. RM 10.9 is located within the RM 10.9 Operable Unit.

u. “RM 10.9 Operable Unit” shall mean the operable unit of the LPRSA which includes RM 10.9, as delineated by the Settling Parties and as depicted in figure attached hereto as Appendix C.

v. “RPM” shall mean the EPA Remedial Project Manager, designated by EPA under Paragraph 34 of the RI/FS Settlement Agreement, or her successor or successors.

w. “Settling Funding Parties” shall mean those Parties identified in Appendix A-2.

x. “Settling Parties” shall mean those Parties identified in Appendix A, as amended from time to time, including the Settling Work Parties and the Settling Funding Parties and their heirs, successors and assigns. Settling Parties are also signatories to the RI/FS Settlement Agreement.

y. “Settling Work Parties” shall mean those Parties identified in Appendix A-1.

z. “Section” shall mean a portion of this Settlement Agreement identified by a Roman numeral.

~~saa~~. “Settlement Agreement” shall mean this Administrative Settlement Agreement and Order on Consent and all appendices attached hereto (listed in Section XXXI). In the event of conflict between this Settlement Agreement and any appendix, this Settlement Agreement shall control.

~~tbb~~. “Site” ~~for purposes of this~~ shall have the meaning provided for in paragraph 14(ff) of the RI/FS Settlement Agreement ~~shall mean the Diamond Alkali Superfund Site, including the property located at 80 and 120 Lister Avenue in Newark, New Jersey, and the Lower Passaic River Study Area, and the areal extent of contamination.~~

~~ucc~~. “State” shall mean the State of New Jersey.

~~vdd~~. “Statement of Work” or “SOW” shall mean the statement of work for implementation of the ~~removal action~~ Work, as set forth in Appendix D to this Settlement Agreement, and any modifications made thereto in accordance with this Settlement Agreement. The SOW shall also include criteria for terminating a Pilot Study should it appear prior to the completion of the study that the technology studied in the Pilot Study will not produce a feasible remedial program due to technical problems or a lack of cost effectiveness.

~~wee~~. “Waste Material” shall mean 1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and 3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

~~*ff~~. “Work” shall mean all activities Settling Parties are required to perform under this Settlement Agreement, except those required by Section XI (Record Retention) The term includes the removal actions required under this Settlement Agreement, including the Pilot Studies to be performed under the SOW in the vicinity of RM 10.9 of the LPRSA.

IV. EPA FINDINGS OF FACT

~~11~~12. EPA makes the following findings of fact:

a. Since at least the ~~late~~early 1800s, the ~~lower Passaic River~~ LPRSA has been a highly industrialized waterway, receiving direct and indirect discharges from numerous industrial facilities, as well as discharges from and bypasses of sewage treatment facilities and surface water runoff.

b. In 1983, hazardous substances were detected at various locations in Newark, New Jersey, including at the Diamond Alkali Facility located at 80 Lister Avenue.

c. EPA, pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, placed the Diamond Alkali Superfund Site on the National Priorities List, which is set forth at 40 C.F.R. Draft –For Settlement Negotiation Purposes Only – Subject to FR Evid 408 - 3/30/12
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Part 300, Appendix B, by publication in the Federal Register on September 21, 1984, 49 Fed. Reg. 37070. EPA has issued a General Notice Letter to each of the Settling Parties, as well as other persons who are not Settling Parties, identifying them as being potentially liable under CERCLA for the Site.

~~d. Pursuant to Administrative Orders on Consent with NJDEP, Diamond Shamrock Chemicals Company conducted investigations and response work for the 80 and 120 Lister Avenue portion of the Diamond Alkali Superfund Site. The investigation included the sampling and assessment of sediment contamination within the Passaic River.~~

ed. Sampling and assessment of sediments in the lower reaches of the Passaic River ~~during the investigation of the Diamond Alkali Facility~~ revealed the presence of many hazardous substances including, but not limited to, polychlorinated dibenzo-p-dioxins (“PCDDs”) and polychlorinated dibenzofurans (“PCDFs”), ~~collectively referred to as “dioxins,”~~ polychlorinated biphenyls (“PCBs”), polyaromatic hydrocarbons (“PAHs”), dichlorodiphenyl-trichloroethate (“DDT”), dieldrin, chlordane, mercury, cadmium, copper, and lead.

~~f. EPA issued a Record of Decision (“ROD”) that set forth an interim remedy for the 80 and 120 Lister Avenue portion of the Diamond Alkali Superfund Site on September 30, 1987. Pursuant to a judicial Consent Decree with EPA and NJDEP, Occidental Chemical Corporation and Chemical Land Holdings, Inc. (now known as Tierra Solutions, Inc.), which had acquired the property shortly before the 1986 stock transaction and was a party to the Consent Decree for specific, limited purposes, agreed to implement the 1987 ROD. The interim remedy was completed in 2004.~~

~~g. Occidental Chemical Corporation, as successor to Diamond Shamrock Chemicals Company, executed an Administrative Order on Consent (“AOC”), Index No. II-CERCLA 0117 with EPA to investigate a~~ e. Sampling results from the investigation of the six-mile stretch of the Passaic River whose southern boundary was the abandoned Conrail Railroad bridge located at ~~the~~ U.S. Army Corps of Engineers (“USACEACOE”) station designation of 40+00 to a transect six miles upriver located at the USACE station designation of 356+80. ~~The primary objectives of the investigation were to determine: (1) the spatial distribution and concentration of hazardous substances, both horizontally and vertically in the sediments; (2) the primary human and ecological receptors of contaminated sediments; and (3) the transport of contaminated sediment.~~

and

~~h. These sampling results from the investigation of the six-mile area and~~ other environmental studies demonstrated that evaluation of a larger area was necessary because sediments contaminated with hazardous substances and other potential sources of hazardous substances are present along at least the entire 17-mile stretch of the Lower Passaic River and its tributaries from Dundee Dam to Newark Bay. Further, the tidal nature of the Lower Passaic River has resulted in greater dispersion of hazardous substances.

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~~if~~. Sampling results show concentrations of dioxins, PCBs, mercury, and other substances that in some areas significantly exceed the levels that can produce toxic effects to biota. Based on the results of monitoring and research undertaken since the mid-1970s, the State of New Jersey has taken a number of steps, in the form of consumption advisories, closures, and sales bans, to limit the exposure of the fish-eating public to toxic contaminants in the lower Passaic River, Newark Bay, the Hackensack River, the Arthur Kill and the Kill Van Kull. The initial measures prohibited the sale, and advised against the consumption, of several species of fish and eel and were based on the presence of PCB contamination in the seafood. The discovery of widespread dioxin contamination in the ~~Newark Bay Complex~~LPRSA led the State of New Jersey to issue a number of fish consumption advisories in 1983 and 1984 which prohibited the sale or consumption of all fish, shellfish, and crustaceans from the ~~Lower Passaic River Study Area~~LPRSA. These State fish advisories and prohibitions are still in effect.

~~ig~~. EPA, with assistance from NJDEP, ~~undertook~~commenced a remedial investigation and feasibility ~~student study~~ (“RI/FS”) encompassing a larger geographic area in the Lower Passaic River.

~~h~~. In May 2007, Settling Parties, having formed ~~a group known as the Cooperating Parties Group (“CPG”)~~, entered into ~~an AOC, CERCLA Docket No. 02-2007-2009 (“RI/FS AOC”)~~the RI/FS Settlement Agreement, under which Settling Parties agreed to complete the RI/FS for the entire 17-mile stretch of the LPRSA. The work pursuant to ~~that AOC~~the RI/FS Settlement Agreement is on-going under the direction and oversight of the RPM.

~~i~~ The RI/FS is being performed under CERCLA and has been coordinated with the USACE and the New Jersey Department of Transportation, its local sponsor until 2009, and NJDEP under the authority of the Water Resources Development Act (“WRDA”) in order to identify and address water quality improvement, remediation, and restoration opportunities in the LPRSA. Further, the federal and State Natural Resource Trustees (the Fish and Wildlife Service of the U.S. Department of the Interior, the National Oceanic and Atmospheric Administration of the U.S. Department of Commerce, and NJDEP) have provided input to the process. Concurrently, EPA is ~~performing a Focused Feasibility Study~~ preparing the FFS with respect to an eight-mile portion of the ~~LPRSA~~17-mile stretch of the LPRSA that is the subject of the RI/FS. The FFS is also ongoing. Both the RI/FS and the FFS shall evaluate remedial alternatives for all or part of the LPRSA. The results of the Pilot Studies shall be considered in those evaluations.

~~kj~~. Although the LPRSA ends at the mouth of Passaic River, because of the tidal nature of the Passaic River, there is reason to believe that the areal extent of contamination extends beyond that boundary. Consequently, in order to determine more accurately the boundaries of contamination from the area studied originally under the AOC, in February 2004, EPA and Occidental Chemical Corporation entered into an AOC to perform an RI/FS for Newark Bay. This RI/FS of Newark Bay is also on-going.

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~~l~~k. As part of the RI/FS for the LPRSA, EPA and the Settling Parties have collected and analyzed sediment samples throughout the study area.

~~m~~l. Sediment samples collected in the vicinity of ~~River Mile 10.9~~ (“RM 10.9”) suggested that ~~significantly~~ elevated concentrations of dioxins, PCBs, mercury, PAHs and other contaminants might be present in this area. In ~~March~~April, 2011, Settling Parties proposed and EPA agreed that Settling Parties would undertake additional sampling and analysis, and perform bathymetry and hydrodynamic survey work, to characterize and develop information about the extent of contamination ~~in the 8.9-acre sediment formation around~~at RM 10.9. The data from the samples collected by Settling Parties confirmed that portions of the sediment located at RM 10.9, which includes a mudflat on the eastern shore of the Passaic River that is exposed at low tide, contains significantly elevated concentrations of dioxins, PCBs, mercury, PAHs and other hazardous substances. The additional bathymetric assessment indicated that the sediment deposit at RM 10.9 is generally stable. In the first six inches of sediment, peak concentrations detected include 2,3,7,8-TCDD at 21.6 parts per billion (“ppb”), PCBs at ~~5734~~ parts per million (“ppm”), mercury at 22 ppm and PAHs at 510 ppm. ~~These maxima are between 13 and 36 times greater than average surface concentrations in this part of the river.~~ Elevated concentrations of dioxins, PCBs and mercury are generally co-located in surface and subsurface sediments.

~~n~~m. A park owned by Bergen County is located on the eastern shore of the River at RM 10.9, directly adjacent to the mudflat that forms part of the ~~highly~~ contaminated area of sediment. Individuals ~~approaching~~utilizing the River, including boaters, waders and ~~fishers~~anglers, could be exposed to the sediments. The sediment at the surface is also exposed to erosion and resuspension and thus may act as a source of contamination to other parts of the river. including the lower eight miles of the river which are the subject of the FFS. A risk assessment performed by EPA concluded that risks to direct exposure to the public from the contamination present in the surface sediments at RM 10.9 are within acceptable risk ranges.

n. Pursuant to this Settlement Agreement, as set forth in the SOW, Settling Work Parties will implement a removal action which includes Pilot Studies through the efforts of independent vendors, to determine the feasibility and effectiveness of *ex situ* decontamination and beneficial reuse technologies and innovative capping technologies and *in situ* stabilization technologies. The results of these studies shall be considered in the remedy selection process included in both the FFS and the RI/FS. At the conclusion of each of the Pilot Studies, Settling Work Parties will submit a Pilot Study Report, for EPA approval, evaluating the technologies studied. EPA will approve the Pilot Study Reports if it concludes that they are complete and accurate. EPA will approve the technologies studied for use in the remedy selection process included in both the FFS and the RI/FS if it concludes that the Pilot Studies have demonstrated that the technologies studied meets the Performance Standards set forth in the SOW. The Pilot Study Reports will be included in the Administrative Record developed for the Site.

o. Settling Work Parties have agreed to perform the Work and finance Future Response Costs as set forth in this Settlement Agreement and the attached SOW.

V. EPA CONCLUSIONS OF LAW AND DETERMINATIONS

~~12~~13. Based on the EPA Findings of Fact set forth above, and the Administrative Record supporting the response action to which this settlement applies, EPA has determined that:

a. The ~~Lower Passaic River Study Area~~LPRSA is a “facility” as defined in Section 101(9) of CERCLA, § 9601(9).

b. The contamination found at RM 10.9 includes “hazardous substance(s)” as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), that may present an imminent and substantial endangerment pursuant to Sections 104(a)(1) and 106(a) of CERCLA, 42 U.S.C. §§ 9604(a)(1) and 9606(a).

c. The conditions in the sediments ~~immediately~~ at RM 10.9 meet a number of the specific factors identified in 40 CFR Part 300.415(b)(2) justifying the conduct of a removal action, including, but not limited to:

i. an actual or potential release of hazardous substances, including dioxins, PCBs, mercury and PAHs, exposing nearby human populations, animals or the food chain (40 CFR §300.415(b)(2)(i));

ii. actual or potential contamination of sensitive ecosystems due to the presence of hazardous substances, including dioxins, PCBs, mercury and PAHs (40 CFR §300.415(b)(2)(ii)); and

iii. high levels of hazardous substances, including dioxins, PCBs, mercury and PAHs, present at or near the surface of the sediment that could migrate or be released due to weather and/or hydrologic conditions (40 CFR §300.415(b)(2)(iv)-(v)).

d. The response ~~action~~actions to be performed pursuant to this Settlement Agreement ~~is~~, including the Pilot Studies, constitute a removal action, pursuant to Section 101(23) of CERCLA, 42 U.S.C. 9601(23).

e. Due to the time-critical nature of this removal action an Engineering Evaluation/Cost Analysis will not be prepared.

f. The implementation of the removal action will contribute to the efficient performance of any anticipated long-term remedial action, by reducing the inventory of contaminated sediments in the Passaic River, reducing the resuspension of contaminated

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sediments, and providing an opportunity for the Pilot Studies of treatment ~~and~~ decontamination and stabilization technologies that ~~could~~shall be considered ~~for use with the contaminated sediments of the LPRSA in the context of~~ as potential remedy components in the RI/FS and the FFS.

g. Each Settling Party is a “person” as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

h. Each Settling Party is a potentially responsible party under one or more subsections of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

i. The conditions described in the Findings of Fact above constitute an actual or threatened “release” of a hazardous substance from a facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), that may present an imminent and substantial endangerment pursuant to Sections 104(a)(1) and 106(a) of CERCLA, 42 U.S.C. §§ 9604(a)(1) and 9606(a).

j. The removal action required by this Settlement Agreement, including the Pilot Studies, is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Settlement Agreement, will be consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP. EPA has determined that the removal action will be done properly by Settling Parties and that it is in the public interest pursuant to Sections 104(a)(1) and 122(a) of CERCLA, 42 U.S.C. §§ 9401(a)(1) and 9622(a).

k. The removal action required by this Settlement Agreement, including the Pilot Studies, is determined to be on-site for purposes of Section 121(e)(1) of CERCLA, 42 U.S.C. § 9621(e)(1).

VI. SETTLEMENT AGREEMENT AND ORDER

~~13~~14. Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered by EPA and Agreed between Settling Parties and EPA that Settling Parties shall comply with all provisions of this Settlement Agreement, including, but not limited to, all attachments to this Settlement Agreement and all documents incorporated by reference into this Settlement Agreement.

VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR

~~14~~15. Selection of Contractors, Personnel. Settling Work Parties shall retain one or more contractors to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within ten (10) days of the Effective Date. Settling Work Parties shall also notify EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s)

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retained to perform the Work at least ~~21~~10 days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Settling Parties if such persons do not meet minimum technical background and experience requirements. If EPA disapproves in writing of ~~any~~ selected ~~contractor~~contractor's technical qualifications, Settling Work Parties shall retain a different contractor and shall notify EPA of that contractor's name and qualifications within 14 days of EPA's disapproval. Any proposed contractor must demonstrate compliance with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01-002, March 2001) or equivalent documentation as determined by EPA.

~~45~~16. Within 10 days after the Effective Date, Settling Work Parties shall designate a Project Coordinator who shall be responsible for administration of all actions by Settling Work Parties required by this Settlement Agreement and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent ~~possible~~practicable, the Project Coordinator shall be present on Site or readily available during ~~Site~~the conduct of the Work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Settling Work Parties shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within 10 days following EPA's disapproval. Settling Work Parties shall have the right to change their Project Coordinator, subject to EPA's right to disapprove. Receipt by Settling Parties' Project Coordinator of any notice or communication from EPA relating to this Settlement Agreement shall constitute receipt by all Settling Work Parties.

~~46~~17. After the Effective Date of the Settlement Agreement, EPA will designate an On-Scene Coordinator ("OSC") from the Removal Action Branch in the Emergency and Remedial Response Division, Region 2. Except as otherwise provided in this Settlement Agreement, Settling Parties shall direct all submissions required by this Settlement Agreement to the OSC at:

U.S. Environmental Protection Agency
2890 Woodbridge Avenue
Edison, New Jersey 08837

EPA, in its discretion, may elect to continue to designate the existing RPM to oversee the Work, instead of an OSC, in which case, Settling Work Parties agree that the RPM shall have all the authorities granted to an OSC under the NCP and Settling Work Parties shall direct all submissions required by this Settlement Agreement to the RPM. References in this Settlement Agreement to the OSC include the RPM if EPA makes such an election.

~~1718.~~ EPA and Settling Work Parties shall have the right to change its designated OSC and Settling Parties shall have the right, subject to Paragraph ~~1516~~, to change their ~~respective~~ designated ~~OSC or~~ Project Coordinator. Settling Parties and EPA shall notify ~~EPA~~ each other 10 days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

VIII. WORK TO BE PERFORMED

~~1819.~~ Settling Work Parties shall perform, ~~at a minimum, all those~~ actions necessary to implement the removal action set forth in the SOW. The actions to be implemented generally include, but are not limited to, the Pilot Studies and the removal and capping of sediments at RM 10.9 ~~of the Passaic River~~ in the area shown in Appendix C. The Work shall be implemented as set forth in the SOW, which is attached as Appendix D. ~~[add sentence describing innovative approaches/pilots]~~

~~1920.~~ Work Plan and Implementation. Within ~~30~~90 days after the Effective Date, Settling Work Parties shall submit to EPA a work plan for the performance of the ~~sediment removal and capping~~ (“Removal/Capping Work (“Work Plan”). Once approved, or approved with modifications, the ~~Removal/Capping~~ Work Plan, the schedule, and any subsequent modifications shall be incorporated into and become fully enforceable under this Settlement Agreement.

a. The ~~Removal/Capping~~ Work Plan shall include plans and an expeditious schedule for implementation of all tasks identified in the SOW, including the conduct of the Pilot Studies.

b. The Work Plan shall include procedures for implementing the Pilot Studies including procedures for determining whether a technology which is the subject of a Pilot Study is infeasible prior to the completion of the Pilot Study work, in accordance with the criteria set forth in the SOW. Should the technology which is the subject of the Pilot Study appear to be infeasible, the Settling Work Parties may petition EPA to discontinue the Pilot Study. If the petition demonstrates that it is more likely than not that the technology which is the subject of the Pilot Study is infeasible, the Pilot Study will be discontinued. Any decision by EPA not to approve a petition to terminate a Pilot Study shall be subject to dispute resolution under Section XVI.

~~b~~ c. Upon approval of the ~~Removal/Capping~~ Work Plan by EPA, Settling Work Parties shall implement the activities required under such ~~Removal/Capping~~ Work Plan. Settling Work Parties shall submit to EPA all plans, submittals, or other deliverables required under ~~each~~ such approved ~~Removal/Capping~~ Work Plan in accordance with the approved schedule for review and approval pursuant to Section IX (EPA Approval of Plans and Other Submissions). Settling Work Parties shall not commence any Work except in conformance

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with the terms of this Settlement Agreement. Settling Work Parties and shall not commence implementation of ~~any~~the Work

Plan developed hereunder until receiving written EPA approval.

~~2021.~~ Health and Safety Plan. Within ~~30~~90 days after the Effective Date, Settling Work Parties shall submit for EPA review and comment a plan that ensures the protection of the public health and safety during performance of Work under this Settlement Agreement. This plan shall be prepared in accordance with EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration ("OSHA") regulations found at 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan shall also include contingency planning. Settling Parties shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the pendency of the ~~removal-action~~Work. The Settling Parties may ~~submit an amendment to incorporate by reference~~ the Health and Safety Plan submitted pursuant to the RI/FS ~~AOC~~Settlement Agreement to satisfy this requirement for the Work.

±

~~2122.~~ Quality Assurance and Sampling.

a. Settling Work Parties shall use quality assurance, quality control, and chain of custody procedures for all bench scale, pilot, design, compliance, and monitoring samples in accordance with "EPA Requirements for Quality Assurance Project Plans (QA/R5)" (EPA/240/B-01/003, March 2001, reissued May 2006), "Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/240/R-02/009, December 2002), and subsequent amendments to such guidelines upon notification by EPA to Settling Work Parties of such amendment. Amended guidelines shall apply only to procedures conducted after such notification.

b. Prior to the commencement of any monitoring project under this Settlement Agreement, Settling Work Parties shall submit to EPA for approval a Quality Assurance Project Plan ("QAPP") that is consistent with the SOW and the NCP. The QAPP may incorporate by reference the Quality Assurance Project Plan approved by EPA under the RI/FS Settlement Agreement. Settling Work Parties shall ensure that EPA personnel and its authorized representatives are allowed access at reasonable times to all laboratories utilized by Settling Work Parties in implementing this Settlement Agreement. Settling Work Parties shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this Settlement Agreement perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods that are documented in the "USEPA Contract Laboratory Program Statement of Work for Inorganic Analysis, ILM05.4," and the "USEPA Contract Laboratory Program Statement of Work for Organic Analysis, SOM01.2," and any amendments made thereto during the course of the implementation of this Settlement Agreement; however, upon approval by EPA, Settling Work Parties may use other analytical methods that are as stringent as or more stringent than the CLP-approved methods. Settling Work Parties shall ensure that all laboratories they use for analysis of samples taken pursuant to this Settlement Agreement

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participate in an EPA or EPA-equivalent quality assurance/quality control (“QA/QC”) program. Settling Work Parties shall use only laboratories that have a documented Quality System that complies with ANSI/ASQC E4-1994, “Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs” (American National Standard, January 5, 1995), and “EPA Requirements for Quality Management Plans (QA/R-2)” (EPA/240/B-01/002, March 2001, reissued May 2006) or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (“NELAP”) as meeting the Quality System requirements. Settling Work Parties shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Settlement Agreement are conducted in accordance with the procedures set forth in the QAPP approved by EPA.

~~22~~23. Upon request, EPA or Settling Work Parties shall allow split or duplicate samples to be taken by EPA each other or ~~its~~their authorized representatives. EPA and Settling Work Parties shall notify EPA each other not less than 14 days in advance of any sample collection activity unless shorter notice is agreed to by EPA the Parties. In addition, EPA and Settling Work Parties shall have the right to take any additional samples that ~~EPA deems~~they deem necessary.

~~23~~24. Settling Work Parties shall submit to EPA copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Work Parties with respect to the Site and/or the implementation of this Settlement Agreement unless EPA agrees otherwise.

~~24~~25. Notwithstanding any provision of this Settlement Agreement, the ~~United States~~EPA retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

~~25~~26. Post-Removal Site Control. In accordance with the Work Plan schedule, or as otherwise directed by EPA, Settling Parties shall submit a proposal for post-removal site control consistent with Section 300.415(l) of the NCP and OSWER Directive No. 9360.2-02. Upon EPA approval, Settling Parties shall implement such controls and shall provide EPA with documentation of all post-removal site control arrangements.

~~26~~27. Reporting.

a. Settling Work Parties shall submit a monthly written progress report to EPA concerning actions undertaken pursuant to this Settlement Agreement by the 15th day of the following month, commencing after the date of receipt of EPA’s approval of the Work Plan until termination of this Settlement Agreement, unless otherwise directed in writing by the OSC. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the

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reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

b. Settling [Work](#) Parties shall submit four (4) copies of all plans, reports or other submissions required by this Settlement Agreement, the Statement of Work, or any approved Work Plan. Upon request by EPA, Settling Parties shall submit such documents in electronic form. One copy of each report shall be submitted to the following:

U.S. Environmental Protection Agency
2890 Woodbridge Avenue
Edison, New Jersey 08837
Attn: Lower Passaic River Study Area On-Scene Coordinator

Emergency and Remedial Response Division
U.S. Environmental Protection Agency, Region 2
290 Broadway, 19th Floor
New York, New York 10007-1866
Attn: Lower Passaic River Study Area Remedial Project Manager

Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, New York 10007-1866
Attn: Lower Passaic River Study Area Site Attorney

New Jersey Department of Environmental Protection
Site Remediation Program
401 E. State Street
P.O. Box 028
Trenton, New Jersey 08265-0028
Attn: Lower Passaic River Study Area Project Manager

~~27~~28. Final Report. Within 60 days after completion of each of the Pilot Studies required by this Settlement Agreement, or within such longer period as EPA may approve, Settling Work Parties shall submit for EPA review and approval, a Pilot Study Report, evaluating the feasibility and technical and cost effectiveness of the technologies studied for use in the RI/FS and FFS. Within 60 days after completion of all Work required by this Settlement Agreement, Settling [Work](#) Parties shall submit for EPA review and approval a final report summarizing the actions taken to comply with this Settlement Agreement. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled Draft –For Settlement Negotiation Purposes Only – [Subject to FR Evid 408 - 3/30/12](#)
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“OSC Reports.” The final report shall include a good faith estimate of total costs or a statement of actual costs incurred in complying with the Settlement Agreement, a listing of quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action (e.g., manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

“Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

~~2829~~. Off-Site Shipments.

a. Settling Work Parties shall, prior to any off-Site shipment of Waste Material from the ~~Site~~RM 10.9 Operable Unit to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility’s state and to the ~~On Scene Coordinator~~OSC. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

i. Settling Work Parties shall include in the written notification the following information: 1) the name and location of the facility to which the Waste Material is to be shipped; 2) the type and quantity of the Waste Material to be shipped; 3) the expected schedule for the shipment of the Waste Material; and 4) the method of transportation. Settling Work Parties shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

ii. The identity of the receiving facility and state will be determined by Settling Work Parties following the award of ~~the any~~ contract for the removal ~~action~~and off-Site disposal of Waste Material. Settling Work Parties shall provide the information required by Paragraph ~~2829~~(a) and ~~2422~~(b) as soon as practicable after the award of ~~the any such~~ contract and before the Waste Material is actually shipped.

b. Before shipping any hazardous substances, pollutants, or contaminants from the ~~Site~~RM 10.9 Operable Unit to an off-Site location, Settling Work Parties shall obtain EPA’s certification that the proposed receiving facility is operating in compliance with the Draft –For Settlement Negotiation Purposes Only – Subject to FR Evid 408 - 3/30/12 ~~Subject to EPA Management Review and Approval – 2/17/2012~~

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requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Settling Work Parties shall only send hazardous substances, pollutants, or contaminants from the Site RM 10.9 Operable Unit to an off-Site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

IX. SITE ACCESS

~~29~~30. If any portion of the Site, or any other property where access is needed to implement this Settlement Agreement, is owned or controlled by any of the Settling Parties, such Settling Parties shall, commencing on the Effective Date, provide EPA and the State, and their representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Settlement Agreement.

~~30~~31. Where any action under this Settlement Agreement is to be performed in areas owned by or in possession of someone other than Settling Parties, Settling Work Parties shall use their best efforts to obtain all necessary access agreements within 30 days after the Effective Date, or as otherwise specified in writing by the OSC. Settling Work Parties shall immediately notify EPA if after using their best efforts they are unable to obtain such agreements. For purposes of this Paragraph, “best efforts” includes the payment of reasonable sums of money in consideration of access. Settling Work Parties shall describe in writing their efforts to obtain access. If Settling Work Parties cannot obtain access agreements, EPA may either obtain access for Settling Work Parties, or assist Settling Work Parties in gaining access, to the extent necessary to effectuate the response actions described in this Settlement Agreement, using such means as EPA deems appropriate. Settling Parties shall reimburse EPA for all costs and attorney’s fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Response Costs).

~~31~~32. Notwithstanding any provision of this Settlement Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

X. ACCESS TO INFORMATION

~~32~~33. Settling Parties shall provide to EPA, upon request, copies of all non-privileged documents and information within their possession or control or that of their contractors or agents relating to ~~activities at the~~ Site Work or to the implementation of this Settlement Agreement, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Settling Parties shall also make available to EPA, at reasonable times and places, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

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~~33~~34. Settling Parties may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Settlement Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Settling Parties that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Settling Parties. Settling Parties shall segregate and clearly identify all documents and information submitted under this Settlement Agreement for which Settling Parties assert business confidentiality claims.

~~34~~35. Settling Parties may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Parties assert such a privilege in lieu of providing documents, they shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by Settling Parties. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

~~35~~36. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XI. RECORD RETENTION

~~36~~37. Until ~~10~~5 years after Settling Parties' receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), each Settling Party, or common counsel for the Settling Parties or their Project Coordinator, shall preserve and retain at least one copy of all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until ~~10~~5 years after Settling Parties' receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), Settling Parties shall also instruct their contractors and agents to preserve

all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

~~37~~38. At the conclusion of this document retention period, Settling Parties shall notify EPA at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA, Settling Parties shall deliver any such records or documents to EPA. Settling Parties may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege, they shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Settling Parties. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

~~38~~39. Each Settling Party hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, and except for the documents listed on Appendix F, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by EPA or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XII. COMPLIANCE WITH OTHER LAWS

~~39~~40. Settling Work Parties shall perform ~~all actions~~the Work required pursuant to this Settlement Agreement in accordance with all applicable state and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). No local, state or federal permit shall be required for any portion of the Work conducted on-Site, including the Pilot Studies, if the actions comprising the Work are selected and carried out in compliance with Section 121 of CERCLA, 42 U.S.C. § 9621. Actions conducted pursuant to EPA-approved plans shall be considered to be on the Site for purposes of Section 121(e) of CERCLA. Where any portion of the Work is to be conducted off the Site and requires a federal or state permit or approval, Settling Work Parties shall submit timely and complete applications and take all other actions necessary to obtain and to comply with such permits or approvals. In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Settlement Agreement shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements (“ARARs”) under federal environmental or state environmental or facility siting laws. Settling Work Parties shall identify ARARs in the Work Plan subject to EPA approval.

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XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES

~~40~~41. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the ~~Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment~~ LPRSA that is required to be reported to the National Response Center pursuant to Section 103(a) of CERCLA, 42 U.S.C. §9603(a), Settling Work Parties shall immediately take all appropriate action. Settling Work Parties shall take these actions in accordance with all applicable provisions of this Settlement Agreement, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Settling Work Parties shall also immediately notify the OSC or, in the event of his/her unavailability, the EPA Regional Emergency 24-hour telephone number 732-548-8730 of the incident or ~~Site~~ LPRSA conditions. In the event that Settling Work Parties fail to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Settling Work Parties shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XV (Payment of Response Costs).

~~41~~42. In addition, in the event of any release of a hazardous substance from the ~~Site~~ LPRSA, Settling Work Parties shall immediately notify the OSC ~~at [Regional spill phone number?]~~ and the National Response Center at (800) 424-8802. Settling Work Parties shall submit a written report to EPA within 7 days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

XIV. AUTHORITY OF ON-SCENE COORDINATOR

~~42~~43. Unless EPA, in its discretion determines otherwise, the OSC shall be responsible for overseeing Settling Work Parties' implementation of this Settlement Agreement. EPA, in its discretion, may designate the RPM to assume that responsibility, in which event, Settling Parties agree that the RPM shall have all the authority vested in an OSC by the NCP. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any Work required by this Settlement Agreement, or to direct any other removal action undertaken at the ~~Site~~ RM 10.9 Operable Unit under this Settlement Agreement. Absence of the OSC from the ~~Site~~ RM 10.9 Operable Unit shall not be cause for stoppage of work unless specifically directed by the OSC.

XV. PAYMENT OF FUTURE RESPONSE COSTS

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~~43~~44. Payments for Future Response Costs.

a. Settling Work Parties shall pay EPA all Future Response Costs not inconsistent with the NCP. On a periodic basis, EPA will send Settling Work Parties a bill requiring payment that includes a ~~Regionally-prepared cost summary~~ Superfund Cost Recovery Package Imaging and On-Line System ("SCORPIOS") Report, which includes direct and indirect costs incurred by EPA and its contractors. Settling Work Parties shall make all payments within ~~30~~60 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph ~~45~~46 of this Settlement Agreement.

b. Settling Work Parties shall make all payments required by this Paragraph by wire transfer directed to the Federal Reserve Bank of New York with the following information:

ABA = 021030004
 Account = 68010727
 SWIFT address = FRNYUS33
 33 Liberty Street
 New York NY 10045
 Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

c. At the time of payment, Settling Work Parties shall send notice that payment has been made, referencing the name and address of the party making payment, Docket No. CERCLA-02-2012-20__ and EPA Site/Spill ID number 02-96 to:

Emergency and Remedial Response Division
 U.S. Environmental Protection Agency, Region 2
 290 Broadway, 19th Floor
 New York, New York 10007-1866
 Attn: Lower Passaic River Study Area Remedial Project Manager

Office of Regional Counsel
 U.S. Environmental Protection Agency, Region 2
 290 Broadway, 17th Floor
 New York, New York 10007-1866
 Attn: Lower Passaic River Study Area Site Attorney

U.S. Environmental Protection Agency
 Cincinnati Finance Office
 26 Martin Luther King Drive
 Cincinnati, Ohio 45268
 Attn: Finance (Richard Rice)

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~~acctsreceivable.cinwd@epa.gov~~

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d. The total amount to be paid by Settling Work Parties pursuant to Paragraph ~~4344~~(a) shall be deposited by EPA in the Diamond Alkali Site/Lower Passaic River Study Area Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the ~~Site~~RM 10.9 Operable Unit, or to be transferred by EPA to the EPA Hazardous Substance Superfund, or to be returned to the Settling Work Parties if required pursuant to Paragraph 90 of this Settlement Agreement.

~~4445~~. In the event that payments for Future Response Costs are not made within ~~30~~60 days of Settling Work Parties' receipt of a bill, Settling Work Parties shall pay Interest on the unpaid balance. The Interest on Future Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Settling Work Parties' failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVIII.

~~4546~~. Settling Work Parties may contest payment of any Future Response Costs billed under Paragraph ~~4344~~ if ~~it determines~~they determine that EPA has made a mathematical error or has allocated the costs to the wrong Operable Unit account, or if it believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with the NCP or outside the definition of Future Response Costs. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the OSC and the Site attorney. Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Settling Work Parties shall within the 30-day period pay all uncontested Future Response Costs to EPA in the manner described in Paragraph ~~4344~~. Simultaneously, Settling Work Parties shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of New Jersey and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Settling Work Parties shall send to the EPA OSC and the Site attorney a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, Settling Work Parties shall initiate the Dispute Resolution procedures in Section XVI (Dispute Resolution). If EPA prevails in the dispute, within 5 days of the resolution of the dispute, Settling Work Parties shall pay the sums due (with accrued interest) to EPA in the manner described in Paragraph ~~4344~~. If Settling Work Parties prevail concerning any aspect of the contested costs, Settling Work Parties shall pay that portion of the costs (plus associated accrued interest) for which ~~it~~they did not prevail to EPA in the manner described in Paragraph ~~4344~~.

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Settling [Work](#) Parties shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XVI (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Settling [Work](#) Parties' obligation to reimburse EPA for its Future Response Costs.

XVI. DISPUTE RESOLUTION

~~46~~[47](#). Unless otherwise expressly provided for in this Settlement Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Settlement Agreement. The Parties shall attempt to resolve any disagreements concerning this Settlement Agreement expeditiously and informally.

~~47~~[48](#). If Settling [Work](#) Parties object to any EPA action taken pursuant to this Settlement Agreement, including billings for Future Response Costs, they shall notify EPA in writing of their objection(s) within 14 days of such action, unless the objection(s) has/have been resolved informally. EPA and Settling [Work](#) Parties shall have 30 days from EPA's receipt of Settling [Work](#) Parties' written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA. Such extension may be granted orally but must be confirmed in writing.

~~48~~[49](#). Any agreement reached by the parties pursuant to this Section shall be in writing and shall, upon signature by both parties, be incorporated into and become an enforceable part of this Settlement Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, the Director, Emergency and Remedial Response Division, will issue a written decision on the dispute to Settling [Work](#) Parties. EPA's decision shall be incorporated into and become an enforceable part of this Settlement Agreement. Settling [Work](#) Parties' obligations under this Settlement Agreement shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Settling [Work](#) Parties shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

XVII. FORCE MAJEURE

~~49~~[50](#). Settling [Work](#) Parties agree to perform all requirements of this Settlement Agreement within the time limits established under this Settlement Agreement, unless the performance is prevented or delayed by a *force majeure*. For purposes of this Settlement Agreement, a *force majeure* is defined as any event arising from causes beyond the control of Settling [Work](#) Parties, or of any entity controlled by Settling [Work](#) Parties, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Settlement Agreement despite Settling [Work](#) Parties' best efforts to fulfill the obligation. For purposes of this provision, vendors performing the Pilot Studies shall not be

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deemed to be under the control of the Settling Work Parties. *Force majeure* does not include financial inability to complete the Work, increased cost of performance, or a failure to attain performance standards/action levels set forth in the Action Memorandum/Enforcement.

~~50~~51. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement Agreement, whether or not caused by a *force majeure* event, Settling Work Parties shall notify EPA orally within 48 hours of when Settling Work Parties first knew that the event ~~might~~would prevent performance or cause a delay in performance. Within five (5) days thereafter, Settling Work Parties shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Settling Work Parties' rationale for attributing such delay to a *force majeure* event if they intend to assert such a claim; and a statement as to whether, in the opinion of Settling Work Parties, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Settling Work Parties from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

~~51~~52. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Settlement Agreement that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Settling Work Parties in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Settling Work Parties in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

XVIII. STIPULATED PENALTIES

~~52~~53. Settling Work Parties shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs ~~53 and~~ 54 and 55 for failure to comply with the requirements of this Settlement Agreement specified below, unless excused under Section XVII (*Force Majeure*). "Compliance" by Settling Work Parties shall include completion of the activities under this Settlement Agreement or any work plan or other plan approved under this Settlement Agreement identified below in accordance with all applicable requirements of law, this Settlement Agreement, ~~{the SOW,}~~ and any plans or other documents approved by EPA pursuant to this Settlement Agreement and within the specified time schedules established by and approved under this Settlement Agreement.

~~53~~54. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph ~~53~~54(b):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,500.00	1st through 14th day
\$2,500.00	15th through 30th day
\$5,000.00	31st day and beyond

b. Compliance Milestones

- Submittal of ~~Removal/Capping~~ Work Plan (Paragraph ~~19~~20)
- Submittal of Post Removal Site Control Plan (Paragraph ~~25~~26)
- Compliance with Work Milestones as Identified in the SOW

~~54~~55. Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents pursuant to Paragraphs ~~26 and 27~~ and 28:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500.00	1st through 14th day
\$1,500.00	15th through 30th day
\$2,500.00	31st day and beyond

~~55~~56. In the event that EPA assumes performance of all or a substantial portion ~~or all~~ of the Work pursuant to Paragraph ~~65~~66 of Section XX, Settling Work Parties shall be liable for a stipulated penalty in the amount of \$5,000,000. EPA agrees that any penalty assessed against Settling Work Parties under this Paragraph shall be reduced, if appropriate, by the percentage of Work completed by the Settling Work Parties. This paragraph shall not apply to circumstances described in Section IX of this Settlement Agreement.

~~56~~57. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: 1) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Settling Work Parties of any deficiency; and 2) with respect to a decision by the Director, Emergency and Remedial Response Division, under Paragraph ~~48~~49 of Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the Director, Emergency and Remedial Response Division issues a final decision regarding such dispute. Nothing in this Draft –For Settlement Negotiation Purposes Only – Subject to FR Evid 408 - 3/30/12 ~~Subject to EPA Management Review and Approval – 2/17/2012~~

Settlement Agreement shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

~~57~~58. Following EPA's determination that Settling Work Parties have failed to comply with a requirement of this Settlement Agreement, EPA may give Settling Work Parties written notification of the failure and describe the noncompliance. EPA may send Settling Work Parties a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Settling Work Parties of a violation.

~~58~~59. All penalties accruing under this Section shall be due and payable to EPA within ~~30~~60 days of Settling Work Parties' receipt from EPA of a demand for payment of the penalties, unless Settling Work Parties invoke the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to EPA under this Section shall be paid in accordance with the procedures set forth in Paragraph ~~43~~44, and shall indicate that the payment is for stipulated penalties. At the time of payment, Settling Work Parties shall send notice that payment has been made to the EPA Project Coordinator, Site Attorney and Cincinnati Finance Center in accordance with Paragraph ~~43~~44(b).

~~59~~60. The payment of penalties shall not alter in any way Settling Work Parties' obligation to complete performance of the Work required under this Settlement Agreement.

~~60~~61. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of EPA's decision.

~~61~~62. If Settling Work Parties fail to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Settling Work Parties shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph ~~58~~59. Nothing in this Settlement Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Settling Work Parties' violation of this Settlement Agreement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided in this Section, except in the case of a willful violation of this Settlement Agreement or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XX, Paragraph ~~65~~66. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Settlement Agreement.

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XIX. COVENANT NOT TO SUE BY EPA

~~62~~⁶³. In consideration of the actions that will be performed and the payments that will be made by Settling Parties under the terms of this Settlement Agreement, and except as otherwise specifically provided in this Settlement Agreement, EPA covenants not to sue or to take administrative action against Settling Parties pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work, [the RM 10.9 Operable Unit](#) and Future Response Costs. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Settling Parties of all obligations under this Settlement Agreement, including, but not limited to, payment of Future Response Costs pursuant to Section XV. This covenant not to sue extends only to Settling Parties and does not extend to any other person.

XX. RESERVATIONS OF RIGHTS BY EPA

~~63~~⁶⁴. Except as specifically provided in this Settlement Agreement, nothing in this Settlement Agreement shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing in this Settlement Agreement shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Settlement Agreement, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Settling Parties in the future to perform additional activities pursuant to CERCLA or any other applicable law. [Nothing in this Settlement Agreement shall preclude EPA from issuing unilateral administrative orders under Section 106 of CERCLA, 42 U.S.C. § 9606 to persons other than the Settling Parties to perform all or part of the Work, to reimburse EPA for Future Response Costs or to participate and cooperate with the Settling Work Parties in the performance of the Work.](#)

~~64~~⁶⁵. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Settlement Agreement is without prejudice to, all rights against Settling Parties with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Settling Parties to meet a requirement of this Settlement Agreement;
- b. liability for costs not included within the definition of Future Response Costs;
- c. liability for performance of response action other than the ~~Work~~[RM 10.9 Operable Unit](#);

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- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the ~~Lower Passaic River Study Area~~[LPRSA](#); and
- g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the ~~Lower Passaic River Study Area~~[LPRSA](#).

~~6566~~. Work Takeover.

a. In the event EPA determines that Settling [Work](#) Parties have (i) ceased implementation of any portion of the Work, or (ii) ~~is~~[are](#) seriously or repeatedly deficient or late in ~~its~~[the](#) performance of the Work, or (iii) ~~is~~[are](#) implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may issue a written notice (“Work Takeover Notice”) to Settling [Work](#) Parties. Any Work Takeover Notice issued by EPA will specify the grounds upon which such notice was issued and will provide Settling [Work](#) Parties a period of 10 days within which to remedy the circumstances giving rise to EPA’s issuance of such notice.

b. If, after expiration of the 10-day notice period specified in Paragraph ~~6566~~(a), Settling [Work](#) Parties have not remedied to EPA’s satisfaction the circumstances giving rise to EPA’s issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portions of the Work as EPA deems necessary (“Work Takeover”). EPA shall notify Settling [Work](#) Parties in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this Paragraph.

c. Settling [Work](#) Parties may invoke the procedures set forth in Section XVI (Dispute Resolution), to dispute EPA's implementation of a Work Takeover under Paragraph ~~6566~~(b). However, notwithstanding Settling [Work](#) Parties’ invocation of such dispute resolution procedures and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under Paragraph ~~6566~~(b) until the earlier of (i) the date that Settling [Work](#) Parties remedy, to EPA’s satisfaction, the circumstances giving rise to EPA’s issuance of the relevant Work Takeover Notice or (ii) the date that a final decision is rendered in accordance with Section XVI (Dispute Resolution), requiring EPA to terminate such Work Takeover.

d. After commencement and for the duration of any Work Takeover, EPA shall have immediate access to and benefit of any performance guarantee(s) in an amount sufficient to Draft –For Settlement Negotiation Purposes Only – [Subject to FR Evid 408 - 3/30/12](#)
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fund the estimated cost of the remaining Work pursuant to Section XXVI of this Settlement Agreement, in accordance with the provisions of Paragraph ~~8285~~ of that Section. If and to the extent that EPA is unable to secure the resources guaranteed under any such performance guarantee(s) and Settling Work Parties fail to remit a cash amount up to but not exceeding the amount needed to fund the estimated cost of the remaining Work, all in accordance with the provisions of Paragraph ~~8385~~, any unreimbursed costs incurred by EPA in performing Work under the Work Takeover shall be considered Future Response Costs that Settling Work Parties shall pay pursuant to Section ~~XVIXV~~ (Payment of Future Response Costs).

~~6667~~. Notwithstanding any other provision of this Settlement Agreement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

XXI. COVENANT NOT TO SUE BY SETTTLING PARTIES

~~6768~~. Except as specifically set forth in Paragraph ~~6768~~(d) below, Settling Parties covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Future Response Costs, or this Settlement Agreement, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of the Work or arising out of the response actions ~~at or in connection with the Site~~for which the Future Response Costs have been or will be incurred, including any claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Work or Future Response Costs.

d. These covenants not to sue by Settling Parties shall not extend to, and Settling Parties specifically reserve (a) any claims or causes of action for cost recovery or contribution pursuant to Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607;9613, against the United States as a “covered person” (within the meaning of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a)) with respect to this Settlement Agreement, based solely on actions by the United States other than the exercise of the government’s authority under CERCLA, and (b) any claims or causes of action pursuant to the Tucker Act, 28 U.S.C. § 1491, against the United States with respect to this Settlement Agreement, based solely on contracts that do not address or relate to the exercise of the government’s authority under CERCLA.

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~~de~~. These covenants not to sue ~~shall~~do not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs ~~6465~~(b), (c), (e), (f) and (g), but only to the extent that Settling Parties' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

69. Except as provided in Paragraph 6 relating to proceedings to implement or enforce this Settlement Agreement, Settling Parties reserve their right to contest the EPA Findings of Fact contained in Section V of this Settlement Agreement, the EPA Conclusions of Law and Determinations contained in Section VI of this Settlement Agreement, or any responsibility they may be alleged to have for the FFS.

~~68~~70. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XXII. OTHER CLAIMS

~~69~~71. By issuance of this Settlement Agreement, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Settling Parties. The United States or EPA shall not be deemed a party to any contract entered into by Settling Parties or their directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Settlement Agreement.

~~70~~72. Except as expressly provided in Section XIX (Covenant Not to Sue by EPA), nothing in this Settlement Agreement constitutes a satisfaction of or release from any claim or cause of action against Settling Parties or any person not a party to this Settlement Agreement, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

~~71~~73. No action or decision by EPA pursuant to this Settlement Agreement shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

XXIII. CONTRIBUTION

~~72~~74.a. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Settling Parties are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are the Work, the RM 10.9 Operable Unit and Future Response Costs.

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b. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Settling Parties have, as of the Effective Date, resolved their liability to the United States for the Work and Future Response Costs.

c. Nothing in this Settlement Agreement precludes the United States or Settling Parties from asserting any claims, causes of action, or demands for indemnification, contribution, or cost recovery against any persons not parties to this Settlement Agreement. Nothing in this Settlement Agreement diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

XXIV. INDEMNIFICATION

~~73~~75. Settling Parties shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Parties, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Settlement Agreement. In addition, Settling Parties agree to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Settling Parties, their officers, directors, employees, agents, contractors, subcontractors and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Settlement Agreement. For purposes of this Paragraph, any vendors conducting the Pilot Studies shall not be deemed to be acting on behalf of or under the control of Settling Parties. The United States shall not be held out as a party to any contract entered into by or on behalf of Settling Parties in carrying out activities pursuant to this Settlement Agreement. Neither Settling Parties nor any such contractor shall be considered an agent of the United States.

~~74~~76. The United States shall give Settling Parties notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Settling Parties prior to settling such claim.

~~75~~77. Settling Parties waive all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Parties and any person for performance of Work on or relating to the ~~Site~~LPRSA, including, but not limited to, claims on account of construction delays. In addition, Settling Parties shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any

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one or more of Settling Parties and any person for performance of Work on or relating to the ~~Site~~[LPRSA](#), including, but not limited to, claims on account of construction delays.

XXV. INSURANCE

~~76~~78. At least 7 days prior to commencing any on-Site work under this Settlement Agreement, Settling [Work](#) Parties shall secure, and shall maintain for the duration of this Settlement Agreement, comprehensive general liability insurance and automobile insurance with limits of \$5 million dollars, combined single limit, naming EPA as an additional insured. [The insurance required by this Paragraph may be provided via an addendum to the same insurance obtained by the Settling Parties under the RI/FS Settlement Agreement.](#) Within the same time period, Settling [Work](#) Parties shall provide EPA with certificates of such insurance and a copy of each insurance policy. Settling [Work](#) Parties shall submit such certificates and copies of policies each year on the anniversary of the Effective Date. In addition, for the duration of the Settlement Agreement, Settling [Work](#) Parties shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Settling [Work](#) Parties in furtherance of this Settlement Agreement. [For purposes of this Paragraph, vendors performing the Pilot Studies shall not be deemed to be contractors or subcontractors of Settling Work Parties.](#) If Settling [Work](#) Parties demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Settling [Work](#) Parties need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

XXVI. FINANCIAL ASSURANCE

~~77~~79. Within 30 days of the Effective Date, Settling [Work](#) Parties shall establish and maintain financial security for the benefit of EPA in the amount of \$1 million in one or more of the following forms, in order to secure the full and final completion of Work by Settling [Work](#) Parties:

- a. a surety bond unconditionally guaranteeing payment and/or performance of the Work;
- b. one or more irrevocable letters of credit, payable to or at the direction of EPA, issued by financial institution(s) acceptable in all respects to EPA;
- c. a trust fund administered by a trustee ~~acceptable in all respects to EPA~~[\(1\) that has the authority to act as a trustee, and \(2\) whose trust operations are regulated and examined by a U.S. Federal or State agency;](#)
- d. a policy of insurance issued by an insurance carrier acceptable in all respects to EPA, which ensures the payment and/or performance of the Work;

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e. a written guarantee to pay for or perform the Work provided by one or more parent companies of Settling [Work](#) Parties, or by one or more unrelated companies that have a substantial business relationship with at least one of Settling [Work](#) Parties; including a demonstration that any such guarantor company satisfies the financial test requirements of 40 C.F.R. Part 264.143(f); and/or

f. a demonstration of sufficient financial resources to pay for the Work made by one or more of Settling [Work](#) Parties, which shall consist of a demonstration that any such Setting [Work](#) Party satisfies the requirements of 40 C.F.R. Part 264.143(f).

~~7880~~. Any and all financial assurance instruments provided pursuant to this Section shall be in form and substance satisfactory to EPA, determined in EPA's sole discretion. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section (including, without limitation, the instrument(s) evidencing such assurances) are inadequate, Settling [Work](#) Parties shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph ~~7779~~, above. In addition, if at any time EPA notifies Settling [Work](#) Parties that the anticipated cost of completing the Work has increased, then, within 30 days of such notification, Settling [Work](#) Parties shall obtain and present to EPA for approval a revised form of financial assurance (otherwise acceptable under this Section) that reflects such cost increase. Settling [Work](#) Parties' inability to demonstrate financial ability to complete the Work shall in no way excuse performance of any activities required under this Settlement Agreement.

~~7981~~. If Settling [Work](#) Parties seek to ensure completion of the Work through a guarantee pursuant to Subparagraph ~~7779~~(e) or ~~7779~~(f) of this Settlement Agreement, Settling [Work](#) Parties shall (i) demonstrate to EPA's satisfaction that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f); and (ii) resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date or such other date as agreed by EPA, to EPA. For the purposes of this Settlement Agreement, wherever 40 C.F.R. Part 264.143(f) references "sum of current closure and post-closure costs estimates and the current plugging and abandonment costs estimates," the dollar amount to be used in the relevant financial test calculations shall be the current cost estimate of \$~~---~~[\[\]](#) for the Work ~~at the Site~~ plus any other RCRA, CERCLA, TSCA, or other federal environmental obligations financially assured by the relevant Settling [Work](#) Party or guarantor to EPA by means of passing a financial test.

~~8082~~. If, after the Effective Date, Settling [Work](#) Parties can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph ~~7779~~ of this Section, Settling [Work](#) Parties may, on any anniversary date of the Effective Date, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Settling [Work](#) Parties shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security after receiving written approval from EPA. In the event Draft –For Settlement Negotiation Purposes Only – [Subject to FR Evid 408 - 3/30/12](#)
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of a dispute, Settling Work Parties may seek dispute resolution pursuant to Section ~~XXVI~~ (Dispute Resolution). Settling Work Parties may reduce the amount of security in accordance with EPA's written decision resolving the dispute.

83. Settling Work Parties have selected, and EPA has approved, as initial financial assurance pursuant to this Section, a trust fund pursuant to a Trust Agreement attached hereto as Appendix E. Within 10 days of the Effective Date, Settling Work Parties shall execute or otherwise finalize all instruments or other documents required in order to make the selected financial assurance legally binding in a form substantially identical to the document attached hereto as Appendix E and such financial assurance shall thereupon be fully effective. Within 60 days of the Effective Date, Settling Work Parties shall submit all executed and/or otherwise finalized instruments or other documents required in order to make the selected Trust Agreement legally binding to the EPA OSC, as designated in Paragraph 17 of this Settlement Agreement, with a copy to the EPA Diamond Alkali Superfund Site/Lower Passaic River Study Area Attorney.

~~81~~84. Settling Work Parties may change the form of financial assurance provided under this Section at any time, upon notice to and prior written approval by EPA, provided that EPA determines that the new form of assurance meets the requirements of this Section. In the event of a dispute, Settling Work Parties may change the form of the financial assurance only in accordance with the written decision resolving the dispute.

~~82~~85. The commencement of any Work Takeover pursuant to Paragraph ~~65~~66 of this Settlement Agreement shall trigger EPA's right to receive the benefit of any Performance Guarantee(s) provided pursuant to Paragraph ~~77~~79(a), (b), (c), (d), or (e), in accordance with Paragraph ~~65~~66(d) and at such time EPA shall have immediate access to resources guaranteed under any such Performance Guarantee(s), whether in cash or in kind, as needed to continue and complete the Work assumed by EPA under the Work Takeover. If for any reason EPA is unable to promptly secure the resources guaranteed under any such Performance Guarantee(s), whether in cash or in kind, necessary to continue and complete the Work assumed by EPA under the Work Takeover, or in the event that the Performance Guarantee involves a demonstration of satisfaction of the financial test criteria pursuant to Paragraph ~~77~~79(f), Settling Work Parties shall immediately upon written demand from EPA deposit into an account specified by EPA, in immediately available funds and without setoff, counterclaim, or condition of any kind, a cash amount up to but not exceeding the estimated cost of the remaining Work to be performed as of such date, as determined by EPA.

XXVII. MODIFICATIONS

~~83~~86. The OSC may make modifications to any plan or schedule or Statement of Work in writing or by oral direction, provided any such modifications do not materially increase the scope of the Work or the amount of the Future Response Costs. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Settlement Agreement may be modified in writing by mutual

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agreement of the parties. The OSC may authorize minor field modifications to the approved work plans, or the Pilot Studies or other studies, designs, techniques or procedures undertaken or utilized in performing the Work required by this Settlement Agreement, provided that any such modifications are consistent with the SOW. Any such modifications must be memorialized in writing, which may be in electronic form. Minor field modifications within the scope of the SOW do not require the submission of work plans.

~~84~~87. If Settling Work Parties seek permission to deviate from any approved work plan or schedule or Statement of Work, Settling Work Parties' Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Settling Work Parties may not proceed with the requested deviation until receiving oral or written approval from the OSC pursuant to Paragraph ~~83~~86.

~~85~~88. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Settling Work Parties shall relieve Settling Work Parties of their obligation to obtain any formal approval required by this Settlement Agreement, or to comply with all requirements of this Settlement Agreement, unless it is formally modified.

XXVIII. ADDITIONAL WORK

~~86~~89. If EPA determines that additional removal activities not included in an approved plan, but that will not materially expand or alter the scope of the Work described in Paragraph ~~48~~19 or the SOW, or materially increase Future Response Costs, are necessary with respect to RM 10.9, to protect public health, welfare, or the environment, EPA will notify Settling Work Parties of that determination. Unless otherwise stated by EPA, within 30 days of receipt of notice from EPA that additional removal activities are necessary to protect public health, welfare, or the environment, Settling Work Parties shall submit for approval by EPA a Work Plan for the additional Work. The plan shall conform to the applicable requirements of Section VIII (Work to Be Performed) of this Settlement Agreement. Upon EPA's approval of the plan pursuant to Section VIII, Settling Work Parties shall implement the plan for additional removal actions in accordance with the provisions and schedule contained therein. If Settling Work Parties object to the additional Work, Settling Work Parties may seek dispute resolution pursuant to Section XVI. This Section does not alter or diminish the OSC's authority to make oral modifications to any plan or schedule pursuant to Section XXVII (Modifications).

89A. EPA and the Settling Parties may agree to use or adapt this form of Settlement Agreement, including some or all of the appendices attached to this Settlement Agreement, in connection with future work that EPA and the Settling Parties may agree to undertake in the LPRSA.

XXIX. NOTICE OF COMPLETION OF WORK

~~86~~90. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Settlement Agreement, with the exception of any continuing obligations required by this Settlement Agreement, including post-removal site controls, payment of Future Response Costs, and record retention, EPA will provide written notice to Settling Parties and return to them any balance in the Diamond Alkali Site/Lower Passaic River Study Area Special Account attributable to the RM 10.9 Operable Unit. If EPA determines that any such Work has not been completed in accordance with this Settlement Agreement, EPA will notify Settling Work Parties, provide a list of the deficiencies, and require that Settling Work Parties modify the Work Plan if appropriate in order to correct such deficiencies. Settling Work Parties shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Settling Work Parties to implement the approved modified Work Plan shall be a violation of this Settlement Agreement. The written notices provided for in this Paragraph shall be provided by EPA to Settling Parties within 90 days of receipt by EPA of the Final Report.

XXXI. INTEGRATION/APPENDICES

91 ~~87~~. This Settlement Agreement and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement Agreement. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Settlement Agreement. The following appendices are attached to and incorporated into this Settlement Agreement:

Appendix A is the list of Settling Parties.
 Appendix B is the Action Memorandum/Enforcement
 Appendix C is the map of the delineated area at RM 10.9.
 Appendix D is the Statement of Work.
 Appendix E is the Trust Agreement.
Appendix F is the List of Documents

XXXII. EFFECTIVE DATE

~~88~~92. This Settlement Agreement shall be effective on the day that it is signed by the Regional Administrator or his/her delegatee. The undersigned representative(s) of Settling Parties certify(ies) that it (they) is (are) fully authorized to enter into the terms and conditions of this Settlement Agreement and to bind the party(ies) it (they) represent(s) to this document.

It is so ORDERED and Agreed this _____ day of _____, ~~2~~2012.

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BY: _____ DATE: _____

Name

Regional Administrator (or designee)

Region (Number)

U.S. Environmental Protection Agency

EFFECTIVE DATE: _____

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Signature Page: In the matter of the Lower Passaic River Study Area Portion of the Diamond Alkali Superfund Site.

Administrative Agreement and Order on Consent for Removal Action
Agreed this ____ day of _____, 2012 .

For Settling Party _____

By _____

Title _____

Summary Report: Litéra® Change-Pro ML WIX 6.5.0.390 Document Comparison done on 3/30/2012 10:30:26 AM	
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Changes:	
<u>Add</u>	618
Delete	347
Move From	10
<u>Move To</u>	10
<u>Table Insert</u>	0
Table Delete	0
Embedded Graphics (Visio, ChemDraw, Images etc.)	0
Embedded Excel	0
Total Changes:	985